COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of	)	
Global NAPs, Inc.	)	
Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 02-45

MOTION FOR APPROVAL OF FINAL ARBITRATION AGREEMENT OR, IN THE ALTERNATIVE, FOR CLARIFICATION

I. INTRODUCTION

Verizon Massachusetts ("Verizon MA") submits this motion for approval of contract language that conforms to the requirements mandated by the Department in its final arbitration decision dated December 12, 2002.[1]

Following an arbitration proceeding initiated by Global NAPs, Inc. ("GNAPs"), the Department issued its December 2002 Order, which sets forth its final binding legal and policy determinations of the disputed issues, in accordance with § 252(b) of the Telecommunications Act of 1996 ("Act"), and ordered the Parties to file conforming language with the Department. In violation of the Department's order, GNAPs recently informed Verizon MA that it will not negotiate conforming language, but instead intends to adopt another interconnection agreement

[1] Petition of Global NAPs, Inc., pursuant to § 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts, D.T.E. 02-45 (December 12, 2002) ("December 2002 Order").

pursuant to § 252(i) of the Act. In addition, rather than review the final contract language provided by Verizon MA, GNAPs has continued to pursue issues–such as the treatment of reciprocal compensation under the terms of the interconnection agreement–that the Department has already decided in the arbitration. GNAPs' conduct not only violates the Department's December 2002 Order, it also violates the Act's obligation to negotiate an interconnection agreement in good faith (*see* § 252(b)(5) of the Act). To allow GNAPs to simply sidestep the Department's rulings in the December 2002 Order would, in addition, establish precedent that is contrary to the public interest and sound public policy. Accordingly, Verizon MA requests that the Department enter an order approving the attached conforming language as the final binding agreement between the Parties.[2] Alternatively, should the Department permit GNAPs to adopt an interconnection agreement after having arbitrated another agreement, it should do so only on condition that the adopted agreement be modified to reflect the Department's rulings in the December 2002 Order, and that Verizon MA be reimbursed for its attorneys' fees and costs incurred in connection with the recently concluded arbitration proceeding.

II. BACKGROUND

On July 30, 2002, GNAPs filed a petition for binding arbitration pursuant to § 252(b) of the Act to resolve a number of disputes that arose between GNAPs and Verizon MA in the course of negotiating a new interconnection agreement. GNAPs identified nine issues in its arbitration petition and Verizon identified three additional issues in its response to the arbitration petition.

[2] To assist the Department in its review and approval of the contract language, Verizon MA has provided a final version of the final contract language (Exhibit A) and redlined version (Exhibit B) showing changes made to conform the contract to the Department's December 20, 2002 Order.

On August 19, 2002, the Department issued a memorandum addressing the appointment of an arbitrator and establishing the procedural schedule and ground rules for the conduct of the requested arbitration. *See* Memorandum to Parties to D.T.E. 02-45 from Tina W. Chin, Arbitrator re Notice of Appointment of Arbitrator; Procedural Schedule, Ground Rules dated August 19, 2002. Pursuant to the schedule, the parties filed testimony, discovery, and stipulations of issues, and the Department conducted a technical session and an evidentiary hearing. Finally, On October 21 and 28, 2002, the Parties filed their initial and reply briefs, respectively.

Based on its consideration of the record in this arbitration, the Department entered a final binding arbitration decision on December 12, 2002, in which it made the "findings necessary to finalize an interconnection agreement between the Parties." *Id.* The Department ordered the Parties to incorporate its findings into a final interconnection agreement "setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to § 252(e)(1) of the Act, within 21 days." *Id.* at 77.

On December 19, 2002, Verizon MA and GNAPs jointly moved the Department to extend the time period for their compliance with the Department's order for the express purpose of finalizing the language of the arbitrated interconnection agreement. *Joint Motion for Extension of Time* (December 19, 2002). In that joint motion, both Parties acknowledged that, at that time, they were *required* to file the final agreement by January 2, 2003, noted that they were working "diligently" to complete the final interconnection agreement, and requested an extension of this obligation to January 17, 2003. *Id.*

For the first time, on or about January 8, 2003, GNAPs informed Verizon MA that, rather than finalize the contract language in accordance with the Department's order, GNAPs intended

to adopt the currently effective agreement between Verizon MA and Sprint Communications, L.P. ("Sprint Agreement").[3] Verizon MA informed GNAPs that this attempted adoption was not appropriate after having completed an arbitration, that the Department's arbitration was binding, and that the Parties were required to file the final contract language by January 17, 2002. Verizon MA forwarded GNAPs contract language that conforms in all respects to the Department's December 2002 Order.

Despite Verizon MA's request that it do so, GNAPs failed to provide any comments on Verizon MA's conforming contract language. Instead, on January 14, 2003, GNAPs sent a letter to Verizon MA's counsel purporting to seek clarification on issues already addressed by the Department in its December 2002 Order, and asserting that if Verizon MA did not respond to the letter within five business days, it would "bring this matter to the attention of the FCC." *Letter from Scheltema to Beausejour* dated January 14, 2003 (attached Exhibit C). Moreover, on January 16, 2003, GNAPs forwarded the Sprint Agreement to the Department stating that it would adopt that interconnection agreement rather than comply with the Department's December 2002 Order. GNAPs' conduct clearly reflects a refusal to comply with the Department's 2002 Order and to fulfill its continuing obligation to engage in good faith negotiations.

[3] The parties to the Sprint Arbitration filed the final arbitrated Verizon MA/Sprint Agreement on December 19, 2001. That interconnection agreement was approved by operation of law as of January 18, 2002. *See also*, Order, *Petition of Sprint Communications Company L.P., pursuant to section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 00-54-B* (November 28, 2001); Order on Sprint's Motion for Reconsideration; Motion to Admit Late-Filed Exhibit; Motion for Official Notice, *Petition of Sprint Communications Company L.P., pursuant to section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 00-54-A* (May 3, 2001); Order, *Petition of Sprint Communications Company L.P., pursuant to section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 00-54* (December 11, 2000).

II. ARGUMENT

A. GNAPs Should Not Be Permitted Avoid the Department's Binding Arbitration Decision by Adopting a Pre-existing Agreement

The sole reason GNAPs seeks to adopt the Sprint Agreement is to avoid the Department's rulings in the December 2002 Order. The use of the § 252(i) adoption process for this purpose is clearly improper. If GNAPs disagrees with the Department's order, GNAPs may challenge it before this agency and the courts—as GNAPs well knows. On December 30, 2002, GNAPs appealed the December 2002 Order to both the Supreme Judicial Court and the United States District Court. The Department should not permit GNAPs' additional, collateral attack on the December 2002 Order through adoption of the Sprint Agreement.

GNAPs' conduct is inconsistent with its obligations under the Act. While the Act permits carriers to adopt other interconnection agreements, it does not allow Parties to use the § 252 adoption process to flout binding decisions of the Department. In its *Local Competition Order*, the FCC made clear that § 252 arbitration decisions are binding and that carriers that refuse to enter an arbitrated agreement may face penalties for violating their obligation to negotiate in good faith.

> We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to require incumbent LECs to provide interconnection, services, and unbundled network elements, impose a duty to negotiate in good faith and a right to arbitration, and then permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing providers do not have an affirmative duty to enter into agreements under 252, *a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to exp[e]nd resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.*

Local Competition Order, *First Report and Order*, 11 FCC Rcd 15499 (Aug. 8, 1996), at ¶1293 (footnotes omitted, emphasis added). *See also* 47 C.F.R. § 51.807(h) ("Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.").

The Sprint Agreement was available for adoption by GNAPs at the time it commenced the arbitration. GNAPs chose not to adopt it and instead pursued the alternate course of arbitration. As a result of GNAPs' choice, the Department and Verizon MA expended substantial resources over the past five months in connection with the arbitration. GNAPs' last minute attempt to adopt the pre-existing Sprint Agreement, as well as its refusal to comply with the December 2002 Order, constitute failure to negotiate in good faith. *See* § 252(b)(8) (imposing obligation on parties to negotiate in good faith in the context of arbitrations).

Moreover, if the Department allows GNAPs to simply ignore its decision and to adopt the Sprint Agreement, it will establish a precedent that will encourage future "strategic" arbitrations and the waste of the Department's limited resources, as well as those of Verizon MA. In effect, carriers would be encouraged to "roll the dice" to see whether they can obtain particular terms from the Department and then walk away from the table if they don't like the results. The Department should not let GNAPs here, or other carriers, game the process in this way.

Alternatively, if the Department permits GNAPs to adopt another interconnection agreement at this late stage, it should do so only on condition that the adopted agreement be modified to reflect the Department's legal and policy determinations set forth in the December 2002 Order. The Department should, in addition, order GNAPs to reimburse Verizon MA for its attorneys' fees and costs incurred in connection with the arbitration proceeding.

IV. CONCLUSION

For all of the forgoing reasons, Verizon MA requests that the Department enter an order approving the attached conforming language as the final binding agreement between the Parties. If the Department is, however, inclined to allow GNAPs to adopt another agreement, then Verizon MA requests that the Department clarify that the adopted agreement must be modified to be consistent with the December 2002 Order; and order GNAPs to reimburse Verizon MA for its attorneys' fees and costs incurred in connection with the arbitration.

VERIZON NEW ENGLAND INC., d/b/a
VERIZON MASSACHUSETTS,

By its attorneys,

/s/Keefe B. Clemons
Bruce P. Beausejour [MA Bar No. 034840]
Keefe B. Clemons [MA Bar No. 635906]
185 Franklin Street, 13th Floor
Boston, MA 02110
bruce.p.beausejour@verizon.com
keefe.b.clemons@verizon.com

Dated: January 17, 2003